



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD131]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Ferry Berth Improvements in Tongass Narrows in Ketchikan, Alaska.

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; proposed issuance of an Incidental Harassment Authorization; request for comments.

SUMMARY: The National Marine Fisheries Service (NMFS) has modified the incidental harassment authorization (IHA) renewal that was issued to the Alaska Department of Transportation and Public Facilities (ADOT&PF) for the Ferry Berth Improvements Project in Tongass Narrows, Ketchikan, Alaska, on March 1, 2023.

DATES: The modified IHA renewal is effective through March 4, 2024.

ADDRESSES: In case of problems accessing these documents, please call the contact listed below. Electronic copies of the original application and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-alaska-department-transportation-ferry-berth-improvements-0>. In case of problems accessing these documents, please call the contact listed below.

FOR FURTHER INFORMATION CONTACT: Kate Fleming, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to in shorthand as “mitigation”); and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

NMFS has defined “negligible impact” in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Except with respect to certain activities not pertinent here, the MMPA defines “harassment” as: Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or

(ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Summary of Request and Analysis

On March 1, 2023, NMFS issued an IHA renewal to the ADOT&PF, effective March 5, 2023 through March 4, 2023. The IHA authorized take, by Level A harassment and Level B harassment, of marine mammals incidental to construction activities associated with the Ferry Berth Improvements Project in Tongass Narrows in Ketchikan, Alaska (88 FR 13802, March 6, 2023). Species authorized for take included Steller sea lion (*Eumetopias jubatus*), harbor seal (*Phoca vitulina*), harbor porpoise (*Phocoena phocoena*), Dall's porpoise (*Phocoenoides dalli*), Pacific white-sided dolphin (*Lagenorhynchus obliquidens*), killer whale (*Orcinus orca*), humpback whale (*Megaptera novaeangliae*), minke whale (*Balaenoptera acutorostrata*), and northern elephant seal (*Mirounga angustirostris*). The IHA renewal was issued in association with ADOT&PF's planned continuation of a subset of the initially planned construction activities at this project site.

On April 3, 2023, ADOT&PF contacted NMFS to express concern regarding the potential that it could exceed authorized take numbers for killer whales (*Orcinus orca*) and harbor porpoise (*Phocoena phocoena*), and to request that NMFS evaluate a potential modification to the renewal IHA. ADOT&PF indicated that project activities were taking longer than expected due to mechanical delays and encountering unexpected subsurface conditions. Given that a new IHA was in process to replace the active IHA renewal, and that it was not clear that authorized take levels were in danger of being met at the time the request was made, NMFS determined that it would not be appropriate to move forward with a modification at that time.

On June 19, 2023, ADOT&PF contacted NMFS to provide additional information supporting a request for modification of the renewal IHA. ADOT&PF provided updated monitoring data, explaining that Protected Species Observers (PSOs) had reported potential takes by Level B harassment of 18 killer whales, representing 75 percent of take authorized through the renewal IHA. ADOT&PF also reiterated practicability concerns associated with future potential shutdowns that may result from meeting the authorized take numbers. NMFS asked ADOT&PF to provide details regarding the amount of work that had been completed and the amount of work that remained under the renewal.

Based on the updated monitoring data provided by ADOT&PF, in the context of the current status of ongoing work under the renewal IHA and expected remaining duration, NMFS has modified the Ferry Berth Improvement project renewal IHA by increasing authorized take by Level B harassment of killer whale and harbor porpoise, to levels that remain below those initially analyzed and authorized in associated with the initial IHA. NMFS agrees with ADOT&PF that authorizing an increase of take by Level B harassment for killer whale is conservative and appropriate; killer whales in the area often travel in pods larger than the six takes by Level B harassment that remain under the current authorization level. NMFS similarly determined that additional take by Level B harassment for harbor porpoise may be necessary due to few takes remaining under the active IHA renewal and a larger than expected number of individuals having been observed in the project area by PSOs. In addition to the 4 out of 9 authorized takes by Level B harassment reported for harbor porpoise, ADOT&PF's PSO's have observed 29 harbor porpoise in the project area across 46 monitoring days that have been completed under the IHA renewal. NMFS has determined that modification to authorized take numbers for other species is not warranted.

The work analyzed for this modification includes a subset of the same construction activities analyzed for the renewal IHA (*i.e.*, impact pile driving or proofing

of 11 24-inch piles, vibratory pile driving of 4 24-inch piles, and DTH drilling of 7 rock sockets and 18 tension anchors), in the same locations that were described in the IHA renewal and initial IHA on which it is based. NMFS refers the reader to the documents related to the initial IHAs issued on March 1, 2023 and March 5, 2022 (*available at <https://www.fisheries.noaa.gov/action/incidental-take-authorization-alaska-department-transportation-ferry-berth-improvements-0>*) for a more detailed description of project activities. Other relevant documents include the notice of proposed IHAs and request for comments (88 FR 8814, February 10, 2023; 87 FR 5980, February 2, 2022) and notice of issued IHAs (88 FR 13802, March 6, 2023; 87 FR 15387, March 18, 2022). As a result of the aforementioned project difficulties, the total days of activity have been increased relative to what was expected, while the daily duration of activity has been significantly less than expected. ADOT&PF has completed 45 days of in-water work, 15 days more than what was analyzed under the IHA renewal, and estimates that 29 additional days of in-water pile driving is needed to complete the subset of in-water work described above.

A description of the marine mammals in the area of the activities, as well as a description of the potential effects of the specified activities on marine mammals and their habitat are found in these previous documents, which remains applicable to this modified IHA. In addition, NMFS has reviewed the Draft 2022 Stock Assessment Report (Young *et. al.* 2022), information on relevant Unusual Mortality Events, and recent scientific literature, and determined that no new information affects our original analysis of impacts under the IHA renewal.

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the notices of the proposed and final IHAs (87 FR 5980, February 2, 2022; 87 FR 15387, March 18, 2022) for the initial authorization on which the final renewal IHA is based (88 FR 8814, March 6, 2023). The source levels and marine mammal occurrence data applicable to this authorization remain unchanged from

the previously issued IHAs. The stocks taken, methods of take, and types of take also remain unchanged.

In consideration of the information provided by ADOT&PF and described above, NMFS expects that 23 additional killer whale and 9 harbor porpoise may be taken by Level B harassment over the expected remainder of the effective period of the IHA (through March 4, 2024). This is based on 29 estimated remaining construction days to complete the work, representing 97 percent of the original time period included in the analysis for the renewal IHA. Therefore, NMFS determined that it is appropriate to modify the renewal IHA to authorize take by Level B harassment of 47 killer whale and 18 harbor porpoise (Table 1). No increases to take by Level A harassment are warranted or authorized.

Table 1 -- Modification to authorized take for killer whale and harbor porpoise and Proportion of Population Potentially Affected

Authorized take						
Modification Action	Species	Stock	Level A harassment	Level B harassment*	Total	Percent of Stock
No Change	Steller sea lion	Eastern U.S	30	716	746	1.7
No Change	Harbor Seal	Clarence Strait	38	335	373	1.3
Increased Level B take	Harbor Porpoise	Southeast Alaska	5	18	23	0.21
No Change	Dall's Porpoise	Alaska	12	68	80	0.6
No Change	Pacific white-sided Dolphin	North Pacific	0	92	92	3.4
Increased Level B Take	Killer Whale	Alaska Resident	0	47	47	2.4
		West Coast Transient	0			13.5
		Northern Resident	0			15.6
No Change	Humpback Whale	Central North Pacific	0	75	75	0.7
No Change	Minke Whale	Alaska	1	2	3	N/A

No Change	Northern Elephant Seal	California Breeding	0	12	12	0.01
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* The increased take by Level B harassment authorized through this modification do not erase takes that have been reported thus far.

The mitigation, monitoring, and reporting measures remain the same as prescribed in the initial and renewal IHAs.

The described modification of the IHA renewal does not alter the original scope of activity analyzed or the impact analysis in a manner that materially affects the basis for the original findings under the IHA. The take levels authorized through the modified renewal IHA remain below those analyzed and authorized through the initial IHA. Accordingly, we have determined that the additional take authorized in this IHA modification will have a negligible impact on the affected species stocks and, separately, the take will be of small numbers.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental harassment authorizations with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS determined that the issuance of the initial IHA qualified to be categorically excluded from further National Environmental Policy Act review and that application of the Categorical Exclusion to the issuance of the renewal IHA remained appropriate. Similarly, increasing authorized take levels, by Level B harassment only, of killer whales and harbor porpoise is covered through previous application of the Categorical Exclusion.

Finally, Killer whales and harbor porpoise are not listed under the Endangered Species Act (ESA). Therefore, we have determined that additional consultation under the ESA is not required.

Authorization

NMFS has issued a modified IHA to ADOT&PF authorizing the take of marine mammals for the reasons described above, for the potential harassment of small numbers of marine mammals incidental to construction activities associated with the ferry berth improvements project, provided the mitigation, monitoring, and reporting requirements of the initial IHA renewal are implemented.

Dated: July 13, 2023.

Kimberly Damon-Randall,

Director, Office of Protected Resources,

National Marine Fisheries Service.

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